

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MANINDER SINGH KHATKAR,)	CASE NO. C07-0133-JCC
)	
Petitioner,)	
)	
v.)	REPORT AND RECOMMENDATION
)	
ROBERT J. PALMQUIST, Warden,)	
Federal Detention Center, et al.,)	
)	
Respondents.)	
_____)	

INTRODUCTION

Petitioner Maninder Singh Khatkar is a federal prisoner currently serving a fifteen-month sentence for misprision of a felony. Proceeding with counsel, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. (Dkt. 1.) The petition challenges a regulation issued by the federal Bureau of Prisons (“BOP”) that limits the amount of time an inmate may serve in “community confinement,” or at a halfway house. Respondents filed a response to the petition and petitioner filed a reply. (Dkts. 8 & 11.) After considering the parties’ submissions and the balance of the record, the Court recommends that the petition be granted and that BOP be directed to consider petitioner’s request to be released to a halfway house.

01 BACKGROUND

02 Petitioner pleaded guilty to misprision of a felony and was sentenced by this Court to
03 fifteen months in prison followed by one year of supervised release. (Dkt. 8, Attach.1, Ex. 5.)
04 Petitioner did not appeal to the Ninth Circuit Court of Appeals and is currently incarcerated at the
05 Federal Detention Center in Seatac, Washington. The BOP projects his release date to be
06 September 26, 2007. (*Id.*, Attach. 2 at 2.)

07 Based upon a regulation, BOP does not permit inmates to serve more than ten percent of
08 their sentence in a halfway house. See 28 C.F.R. § 570.21 (hereinafter “the regulation”).
09 Accordingly, the agency determined petitioner would not be eligible for transfer to a halfway
10 house until thirty nine days prior to his release date. (Dkt. 8, Attach. 2 at 2.) He has been referred
11 and accepted for placement at a halfway house beginning August 20, 2007. (*Id.*)

12 On October 23, 2006, petitioner submitted an Informal Resolution Attempt requesting to
13 be allowed to spend more than thirty nine days in a halfway house. (*Id.*, Attach. 1, Ex. 6.) BOP
14 denied the request, citing a “statutory limit to halfway house limited to the eligibility, pre-release
15 preparation date.” (*Id.*) On October 24, 2006, petitioner filed a Request for Administrative
16 Review, again seeking to spend more than thirty nine days in a halfway house. (*Id.*) In a response
17 dated December 3, 2006, BOP again denied the request, stating: “Pursuant to 18 U.S.C. 3624 ©,
18 [Residential Re-entry Center (RRC)] placement for pre-release programming is limited to the last
19 10% of the prison sentence being served, not to exceed six months. With a 15 month sentence
20 you are eligible for 39 days RRC placement.” (*Id.*) Petitioner appealed this decision through a
21 Regional Administrative Remedy Appeal, but, on December 20, 2006, the BOP denied the appeal
22 for the reasons previously stated. (*Id.*) On January 17, 2007, petitioner appealed this decision

01 with the Central Office of the BOP. (*Id.*, Ex. 1.) The Central Office's response is due March 9,
02 2007. (*Id.*) Petitioner filed the instant petition in this Court on January 29, 2007. (*See* Dkt. 1.)

03 DISCUSSION

04 As previously stated, petitioner challenges the regulation relied upon by BOP in denying
05 his request for early transfer to a halfway house. This claim is properly brought in a petition under
06 28 U.S.C. § 2241 because it concerns the manner of the execution of the sentence and not the fact
07 of petitioner's conviction or sentence. *See Tucker v. Carlson*, 925 F.2d 330, 331 (9th Cir. 1991).
08 Before considering that challenge, however, the Court must first consider respondents' argument
09 that the petition should be dismissed because petitioner failed to completely exhaust his
10 administrative remedies.

11 A. Exhaustion of Administrative Remedies

12 Ordinarily, a petitioner in federal custody and seeking habeas relief pursuant to 28 U.S.C.
13 § 2241 must first exhaust available administrative and judicial remedies. *See Brown v. Rison*, 895
14 F.2d 533, 535 (9th Cir. 1990). However, because the exhaustion requirement for § 2241 petitions
15 was judicially created, it is not a statutory requirement and, therefore, not jurisdictional. *See*
16 *Morrison-Knudsen Co., Inc. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1223 (9th Cir. 1987). "Where
17 exhaustion of administrative remedies is not jurisdictional, the district court must determine
18 whether to excuse the faulty exhaustion and reach the merits, or require the petitioner to exhaust
19 his administrative remedies before proceeding in court." *Brown*, 895 F.2d at 535.

20 Here, respondents note that an administrative remedy appeal is not considered to be
21 exhausted until reviewed by BOP's Central Office, *see* 28 C.F.R. § 542.15, and that, in this case,
22

01 the Central Office's response to petitioner's appeal was not due until March 19, 2007.¹ However,
02 petitioner argues that his failure to exhaust should be excused because the question here is one of
03 statutory interpretation and BOP is firm in its answer. Thus, it is unlikely BOP will change its
04 position and requiring petitioner to finish the administrative review process would likely be futile.
05 In addition, the Court notes that, as his release date is September 26, 2007, petitioner's claim is
06 time-sensitive, with the possibility of becoming moot if he were required to wait to file a habeas
07 petition until BOP issued its final decision.

08 Respondents argue petitioner should be required to exhaust his administrative remedies
09 because doing so would allow BOP "to consider all of its options." (Dkt. 8 at 5.) However,
10 nothing in the record supports the notion that BOP would consider any options other than to deny,
11 based upon the regulation, petitioner's request for early transfer to a halfway house. Indeed, BOP
12 thrice denied petitioner's request to spend more than thirty nine days in a halfway house based on
13 their interpretation of the regulation. (*See* Dkt. 8, Attach. 2, Ex. 6.) As BOP argues in its
14 response to the § 2241 petition, it considers the regulation to be an unambiguous and categorical
15 limitation on the class of prisoners eligible for halfway house placement. (*See generally* Dkt. 8.)
16 Therefore, it would be futile to require petitioner to pursue further administrative review of his
17 claim and the Court recommends excusing petitioner's failure to exhaust all remedies.
18 Accordingly, the Court will proceed to the merits of petitioner's claim.

19 B. Petitioner's Challenge to BOP Regulation

20 Petitioner argues that the regulation issued by BOP that prevents him from being
21 _____

22 ¹ Respondents submitted their response to petitioner's petition prior to this due date. It is not clear whether, to date, the Central Office has issued a response to petitioner's appeal.

01 considered for release to a halfway house until he has served ninety percent of his sentence violates
02 BOP's statutory authority. The statute that authorizes BOP to place prisoners in an appropriate
03 facility, 18 U.S.C. § 3621(b) (hereinafter "the statute"), provides as follows:

04 (b) Place of imprisonment – The Bureau of Prisons shall designate the place of the
05 prisoner's imprisonment. The Bureau may designate any available penal or
06 correctional facility that meets minimum standards of health and habitability
07 established by the Bureau, whether maintained by the Federal Government or
08 otherwise and whether within or without the judicial district in which the person was
09 convicted, that the Bureau determines to be appropriate and suitable, considering –

07 (1) the resources of the facility contemplated;

08 (2) the nature and circumstances of the offense;

09 (3) the history and characteristics of the prisoner;

10 (4) any statement by the court that imposed the sentence–

11 (A) concerning the purposes for which the sentence to imprisonment was
12 determined to be warranted; or

13 (B) recommending a type of penal or correctional facility as appropriate; and

14 (5) any pertinent policy statement issued by the Sentencing Commission pursuant
15 to section 994(a)(2) of title 28.

16 In designating the place of imprisonment or making transfers under this subsection,
17 there shall be no favoritism given to prisoners of high social or economic status. *The*
18 *Bureau may at any time, having regard for the same matters, direct the transfer of*
19 *a prisoner from one penal or correctional facility to another.* The Bureau shall
20 make available appropriate substance abuse treatment for each prisoner the Bureau
21 determines has a treatable condition of substance addiction or abuse.

19 18 U.S.C. § 3621(b) (emphasis added).

20 Until the end of 2002, BOP interpreted the statute as authorizing prisoners to serve any
21 part, including the entirety, of their sentence in a facility such as a halfway house. (See Dkt. 8 at
22 6.) However, in December 2002, the Department of Justice Office of Legal Counsel issued an

01 opinion that concluded BOP lacked such authority because, the Office of Legal Counsel reasoned,
02 placement in a halfway house did not constitute imprisonment. (*Id.*, Attach. 1, Ex. 6.) BOP
03 subsequently limited placement in halfway houses to ten percent of a prisoner's term, or six
04 months, whichever was less.

05 In 2004, two circuit courts of appeals found BOP's new interpretation of the statute and
06 limitation on placement contrary to the plain language of the statute, which permitted BOP to
07 transfer a prisoner to a halfway house at any time. *See Elwood v. Jeter*, 386 F.3d 842 (8th Cir.
08 2004); *Goldings v. Winn*, 383 F.3d 17 (1st Cir. 2004). In response to these rulings, BOP adopted
09 a new tact and issued a regulation that it termed "its categorical exercise of discretion for
10 designating inmates to community confinement when serving terms of imprisonment." (Dkt. 8,
11 Attach. 1, Ex. 6.) The regulation became effective on February 14, 2005 and states as follows:

12 (a) The Bureau will designate inmates to community confinement **only** as part of pre-
13 release custody and programming, **during the last ten percent** of the prison sentence
being served, not to exceed six months.

14 28 C.F.R. § 570.21 (emphasis added).

15 The question presented by the instant habeas petition is whether the statute granting BOP
16 authority to place prisoners is susceptible to the interpretation given it by BOP, as reflected in the
17 above regulation. In reviewing an agency's construction of a statute, courts apply the test set
18 forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
19 A court must first examine the text of the statute to determine whether Congress has spoken
20 directly on the issue. *Contract Management, Inc. v. Rumsfeld*, 434 F.3d 1145, 1146 (9th Cir.
21 2006). If the intent of Congress is clear from the text of the statute, a court need inquire no
22 further and must follow the expressed intent of Congress. *Id.* at 1146-47. If, however, the statute

01 is silent or ambiguous on the specific issue, a court must determine whether the agency's
02 interpretation is based on a permissible construction of the statute. *Id.* at 1147. If so, the Court
03 defers to the agency's determination. *Id.*

04 At the outset, the Court notes that the majority of courts that have considered this issue,
05 including the three circuit courts of appeals to have addressed it, have found that the regulation
06 conflicts with the statute. *See, e.g., Levine v. Apker*, 455 F.3d 71, 86-87 (2d Cir. 2006); *Fults v.*
07 *Sanders*, 442 F.3d 1088, 1090-92 (8th Cir. 2006); *Woodall v. Federal Bureau of Prisons*, 432
08 F.3d 235, 244 nn. 9-10 (3d Cir. 2005) (collecting district court cases).² Most of these courts
09 found the statute's meaning clear and no deference to BOP's interpretation required. This Court
10 recently reached the same conclusion. *Pankratz v. Palmquist*, No. C06-1328-RSL, slip op. at 1
11 (W.D. Wash. Feb. 2, 2007) (adopting Amended Report and Recommendation issued Jan. 5,
12 2007). For the same reasons previously identified, the undersigned again recommends that the
13 regulation be found invalid.

14 The statute unambiguously grants BOP authority to place prisoners in an appropriate
15 facility *at any time*, including at the outset of their sentence, after considering five factors. *See* 18
16 U.S.C. § 3621(b); *Woodall*, 432 F.3d at 240. Because the text of the statute is clear, no deference
17 to BOP's interpretation is required. *Contract Management, Inc.*, 434 F.3d at 1146-47. The
18 regulation is impermissibly at odds with the statutory scheme because the regulation categorically
19 limits the amount of time that may be spent in a halfway house and imposes that limit without
20 regard to the statutory factors Congress mandated BOP to consider. *See Levine*, 455 F.3d at 80-

21
22 ² The Ninth Circuit Court of Appeals has yet to address the issue.

82; *Woodall*, 432 F.3d at 245. Thus, in changing the previous policy and issuing the new regulation, BOP misconstrued the underlying statute and the regulation is consequently invalid.

C. Respondents' Arguments

Respondents raise the same arguments previously brought before this Court. (*See* Dkt. 8 and *Pankratz*, No. C06-1328-RSL (Dkt. 9).) Respondents' principal argument is that BOP's authority for limiting an inmate's time in a halfway house stems from another statute, 18 U.S.C. § 3624, which provides as follows:

(c) Pre-release custody – the Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community. The authority provided by this subsection may be used to place a prisoner in home confinement. The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody.

18 U.S.C. § 3624(c) (hereinafter "section 3624").³

Respondents contend that section 3624 "limits the BOP's ability to place a prisoner in pre-release status to the last ten percent (10%) of his sentence." (Dkt. 8 at 12.) The Court, however, sees no such limit in the plain language of this statute. Rather, section 3624 appears to set forth a minimum amount of time – ten percent of the inmate's sentence – that should be spent under conditions that will help an inmate prepare for re-entry into the community, *i.e.*, in a halfway house

³ Respondents alerted the Court that, in 2005, two bills were introduced in Congress that would have rewritten this statute. (Dkt. 8 at 9, n. 1.) Interestingly, the bills would have increased the amount of time an inmate could spend in a halfway house to twenty percent of the inmate's sentence. *See* H.R. 1704 and S. 1934, available at <http://thomas.gov>. However, as of the date of this Report and Recommendation, the bills had not become law and so have no bearing on the Court's consideration of this matter.

01 or a similar facility. The statute does not say that *no more* than ten percent of the sentence may
02 be served in such a facility, except to say that in no case should the time spent exceed six months.
03 As the Third Circuit noted in *Woodall*, section 3624 “does not determine when BOP should
04 *consider* CCC placement, but when it must *provide* it.” 432 F.3d at 250 (emphasis in original).

05 Respondents also argue that several cases provide general support for BOP’s authority to
06 issue the regulation limiting an inmate’s time in a halfway house to ten percent of the inmate’s
07 overall sentence. First, respondents note that the Ninth Circuit, in *United States v. Latimer*, 991
08 F.2d 1509, 1514-15 (9th Cir. 1993), held that under the federal Sentencing Guidelines,
09 confinement in a halfway house does not constitute incarceration. Similarly, respondents maintain,
10 BOP is free to adopt the same rationale and decline to substitute time in a halfway house for
11 incarceration, except under limited circumstances (*i.e.*, when an inmate has already served ninety
12 percent of his sentence). However, respondents’ reliance on *Latimer* is misplaced. BOP
13 unsuccessfully advanced this argument before in defense of its policy limiting time spent in halfway
14 houses. *See Goldings*, 383 F.3d at 25-26. In addition, *Latimer*’s holding was limited to the
15 Sentencing Guidelines and did not discuss what constitutes “incarceration” under section 3621.
16 *See* 991 F.2d 1509.

17 Respondents also rely on a Supreme Court case, *Lopez v. Davis*, 531 U.S. 230, 238-45
18 (2001), in which the Court examined a different statute than the one at issue here and upheld a
19 BOP regulation that categorically denied eligibility for early release to inmates convicted of certain
20 violent crimes, *see* 28 C.F.R. § 550.58(a)(1)(vi)(B). The underlying statute in *Lopez*, 18 U.S.C.
21 § 3621(e)(2)(B), “provided that the BOP *may* reduce the prison term of an inmate convicted of
22 a ‘nonviolent offense’ if the prisoner successfully completes a substance abuse program.”

01 *Woodall*, 432 F.3d at 246 (citing *Lopez*, 531 U.S. at 232) (emphasis in original). The statute,
02 thus, reflected Congress's concern "about allowing possibly violent inmates to become eligible for
03 pre-release." *Id.* The Court upheld the regulation because, in issuing it, BOP had "filled the
04 statutory gap 'in a way that [was] reasonable in light of the legislature's revealed design.'" *Lopez*,
05 531 U.S. at 242 (quoting *Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S.
06 251, 257 (1995)). The decision in *Lopez* is distinguishable from the question here. The statute
07 at issue in *Lopez*, unlike the statute here, does not require individualized consideration of each
08 inmate. *Woodall*, 432 F.3d at 246-47. *See also Padilla v. Wrigley*, 2006 WL 3268967 at *7
09 (E.D. Cal. November 13, 2006) ("[T]he statute at issue [in *Lopez*] did not specifically include a
10 set of factors to be considered by the BOP in making its determination of whether an offense could
11 be classified as 'violent.'") Therefore, while in *Lopez* BOP simply filled in a statutory gap, here
12 no such claim can be made because in issuing the regulation challenged by petitioner, BOP
13 specifically excluded from consideration the very factors, set forth in 18 U.S.C. § 3621(b),
14 Congress prescribed for consideration. *Id.* at *7-8.

15 In sum, the arguments presented by respondents again do not persuade the Court to
16 deviate from the conclusion previously reached based upon a plain reading of the statute. In
17 issuing the regulation codified at 28 C.F.R. § 570.21, BOP did not act consonant with Congress's
18 intent in passing the underlying statute, 18 U.S.C. § 3621(b). Accordingly, the regulation is
19 invalid and petitioner is entitled to be considered for release to a halfway house prior to having
20 served ninety percent of his sentence.

21 D. Remedy

22 Respondents suggest that, if this Court finds the regulation to be invalid, the appropriate

01 remedy would be reconsideration of petitioner's request to be placed in a halfway house, as
02 opposed to automatic placement. The Court agrees. Accordingly, the recommended remedy is
03 that BOP be directed to reconsider petitioner's request within fourteen days from adoption of this
04 Report and Recommendation.

05 CONCLUSION

06 For the foregoing reasons, petitioner's petition for a writ of habeas corpus should be
07 GRANTED. Respondents should be directed to reconsider petitioner's request for transfer to a
08 halfway house or similar facility, based upon the factors outlined in 18 U.S.C. § 3621(b), without
09 regard to the time limits set forth in 28 C.F.R. § 570.21. A proposed Order reflecting this
10 recommendation is attached.

11 DATED this 10th day of April, 2007.

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13 Mary Alice Theiler
14 United States Magistrate Judge
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